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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FREDERICK DEGROOTH, *et al.*,
Petitioners,

v.

GENERAL DYNAMICS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

JOSEPH G. BISCEGLIA *
CRAIG C. MARTIN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

DAVID W. DEBRUIN
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Attorneys for Respondents

* Counsel of Record

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INTRODUCTION

Respondents, General Dynamics Corporation ("General Dynamics") and the Executive and Professional Plan (the "Plan"), oppose the issuance of a Writ of Certiorari to review the decision of the Court of Appeals for the Second Circuit. Respondents submit this Brief in Opposition pursuant to Supreme Court Rule 15.1.

STATEMENT OF THE CASE

In 1992 and 1993, General Dynamics reduced early retirement benefits under the Plan, which is an "employee welfare benefit plan" pursuant to the Employee Retire-

ment Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(1). General Dynamics' Summary Plan Description ("SPD") for the Plan, which defines the rights of the parties as required by ERISA, 29 U.S.C. § 1022(a)(1), expressly and unambiguously reserved General Dynamics' right to amend, modify or terminate the Plan.

On May 5, 1993, petitioners filed a Complaint against respondents in the United States District Court for the District of Connecticut, seeking to invalidate under ERISA, the 1992 and 1993 reductions on the principal ground that their Plan benefits had been irrevocably vested through informal communications. Petitioners claimed that their benefits in the Plan vested because, after General Dynamics closed the Plan to new entrants effective January 1, 1985, it referred to those employees still eligible for Plan benefits as the "grandfathered" Plan members in various correspondence and interoffice memoranda, and also because, as is typical in welfare benefit plans, petitioners made contributions to the health and life insurance premiums.

The District Court, Chief Judge José A. Cabranes, dismissed petitioners' Complaint with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *DeGrooth v. General Dynamics Corporation*, 837 F. Supp. 485 (D. Conn. 1993). The District Court specifically held that the informal communications informing petitioners of their "grandfathered" status could not irrevocably vest petitioners' benefits in light of the express provision contained in the SPD permitting General Dynamics to modify or terminate the Plan. *DeGrooth*, 837 F. Supp. at 488. The District Court relied on *Moore v. Metropolitan Life Insurance Company*, 856 F.2d 488 (2d Cir. 1988), which rejected an identical vesting claim:

> Plaintiffs . . . argue that the 'contract' between themselves and the Company 'consists of totality of the representations made to the employees by the

> Company, and the actions of the employees in accepting those representations by remaining with the Company. We disagree.
>
> * * * *
>
> Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans. This intention was based on a sound rationale. Were all communications between an employer and plan beneficiaries to be considered along with the SPDs, as establishing the terms of a welfare plan, the plan documents and the SPD would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created . . . .
>
> * * * *
>
> We, therefore, conclude that absent a showing tantamount to proof of fraud, an ERISA welfare plan is not subject to amendment as a result of informal communication between an employer and plan beneficiaries.

Moore, 856 F.2d at 491-92; *DeGrooth*, 837 F. Supp. at 487-88 (quoting *Moore*, 856 F.2d at 492).

The District Court also rejected petitioners' argument that the reservation of rights provision in the SPD did not apply because the SPD had not been updated in other respects and was arguably not in perfect procedural compliance with ERISA regulations. *DeGrooth*, 837 F. Supp. at 488. The District Court reasoned that "[petitioners'] argument could lead to the precise result cautioned against in *Moore*—that is, disputes over the meaning and effect of informal communications between employers and plan beneficiaries—every time a plan administrator failed to comply with one of the technical reporting requirements of ERISA." *Id.* The District Court noted that *Moore* enforced "the terms of an SPD that was not formally amended for seven years, despite 'numerous changes in

its medical plans.'" *Id.* (quoting *Moore*, 856 F.2d at 490).

The Court of Appeals for the Second Circuit, Circuit Judges Frank X. Altimari, Dennis G. Jacobs and Pierre N. Leval, unanimously affirmed the decision of the District Court. (Ptn. Appendix A ("App. A.").) In an unpublished decision, the Court of Appeals reviewed *de novo* the decision of the District Court and found *Moore* "dispositive" of petitioners' Complaint. (App. A at 3a-4a.) Recognizing the absence of conduct tantamount to fraud, the Court held that the informal communications regarding the grandfathering of petitioners' Plan benefits could not vest those benefits in light of General Dynamics' unambiguous reservation of its right to amend or terminate the Plan. (App. A at 4a.)

On May 31, 1994, petitioners filed a Petition for Rehearing and Suggestion for Rehearing en Banc, which was denied on July 14, 1994. (App. B.) On October 12, 1994, petitioners filed a Petition for a Writ of Certiorari, which was received by respondents on October 17, 1994.

REASONS FOR DENYING THE PETITION

The ruling in this case is not remarkable, nor does it present any important or unresolved question of law. As explained in Section I, this case and *Moore* are based on sound reasoning and are consistent with the policies of ERISA. As explained in Section II, this case and *Moore* are also consistent with the decisions of other Circuits. In their petition, petitioners misconstrue the issue and holding in this case and in *Moore* as well as the decisions of the various Circuit Courts of Appeal in an attempt to create a conflict among the Circuits. (Ptn. 8-10). An examination of these cases, however, demonstrates that the ruling here and in *Moore* is consistent with the decisions of the other Circuits and that no conflict among the Circuits exists. Moreover, contrary to petitioners' assertion (Ptn. 10), this Court's grant of certiorari in *Schoonejongen v. Curtiss-Wright Corporation*, 18 F.3d 1034 (3d Cir.), *cert. granted*, 115 S. Ct. 42 (1994), does not impli-

cate this case. *Curtiss-Wright* involves a specific statutory provision of ERISA not involved here.

I. THIS CASE AND *MOORE* DIRECTLY IMPLEMENT THE POLICIES UNDERLYING ERISA.

Pension plans are required by ERISA to vest according to a fixed schedule. 29 U.S.C. §§ 1051(1), 1081(1). Welfare plans, however, do not vest automatically. As explained by Committees of both the House and Senate:

> To require the vesting of these ancillary benefits [medical and life insurance] would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.

H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4670, 4726; S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4890, 4935.

Moore directly implements ERISA's policy that welfare plans do not vest automatically. In *Moore,* the Court considered plaintiffs' argument that their welfare benefits vested because the plan sponsor described their benefits as "lifetime" and "at no cost" in various informal communications. 856 F.2d at 491-93. The Court held that plaintiffs' welfare benefits did not vest because the SPD reserved the plan sponsor's right to amend or terminate. 856 F.2d at 491-93. Noting that Plan SPDs, required by 29 U.S.C. § 1022, "exclusively govern an employer's obligations under ERISA," the Court adopted the rule that "absent a showing tantamount to proof of fraud, an ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan beneficiaries." *Id.* at 492.

In *Moore* and in this case, the SPDs expressly and unambiguously reserved the plan sponsor's right to reduce or even to terminate welfare benefits. *Moore,* 856 F.2d at

490; *DeGrooth*, 837 F. Supp. at 488. In both cases, the plan participants attempted to rely on similar informal communications to vest welfare benefits. *Moore*, 856 F.2d at 490-91; *DeGrooth*, 837 F. Supp. at 488. In *Moore*, the plan participants were told they had "lifetime" benefits "at no cost." *Moore*, 856 F.2d at 490. Here, the plan participants were told they were "grandfathered." *DeGrooth*, 837 F. Supp. at 488. In both cases, the plan participants relied on informal communications to claim that their welfare benefits vested, despite the respective SPDs' reservations of rights. *Moore*, 856 F.2d at 490; *DeGrooth*, 837 F. Supp. at 488. In both cases, the plan participants were unable to plead or prove conduct tantamount to fraud, and thus were barred from relying upon the informal communications to vest plan benefits. *Moore*, 856 F.2d at 492-93; *DeGrooth*, 837 F. Supp. at 488.

Moore and the policy against automatic vesting of welfare plans dispose of petitioners' argument that a contract to vest arose from employee contributions to their life and health insurance. *Moore* rejected the argument that a contract to vest was formed by the retirees who had worked for Metropolitan, and who presumably had made the required contributions. 856 F.2d at 491-92. Following *Moore*, the Eleventh Circuit expressly rejected the argument that health insurance benefits vested where employees made a contribution for their benefits. *Alday v. Container Corp. of Am.*, 906 F.2d 660, 663-64 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). Petitioners' argument would flout congressional intent by automatically vesting the many thousands of welfare benefit plans across the country that require employee contributions (usually because of the rising costs of medical care). *See, e.g.*, 26 U.S.C. § 125 (allowing employees to pay for part of their welfare benefits using pre-tax dollars); *Jorgenson, Flexible Compensation and Cafeteria Plans*, L838 ALI-ABA 1033 (1993) (trend toward employee contributions to welfare plans recognized).

Finally, petitioners' statement that in this case "pronouncements of changes issued by senior corporate management [were] declared [under *Moore*] to be a nullity because they were not incorporated in an SPD issued many years before" (Ptn. 9) mischaracterizes the decision of the Second Circuit. The Second Circuit merely held in this case, consistent with the policy of ERISA and the decision in *Moore*, that an unambiguous reservation of rights provision in the SPD permits a company to change or alter welfare benefits.*

II. THIS CASE AND *MOORE* ARE CONSISTENT WITH AND DO NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

A. This case and *Moore* are consistent with the decisions of other Circuit Courts of Appeal and have been followed by several district courts. Following the lead of *Moore*, the Circuit Courts of Appeal have uniformly held that welfare benefits do not vest automatically, but may be amended or terminated as long as the plan sponsor has reserved the right to do so. *See Allen v. Adage, Inc.*, 967 F.2d 695, 698 (1st Cir. 1992); *United Paperworkers Int'l Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384, 1385-86 (8th Cir. 1992); *McGann v. H & H Music Co.*, 496 F.2d 401, 407 (5th Cir. 1991); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1164 (3d Cir. 1990); *Alday v. Container Corp. of Am.*, 906 F.2d at 665-66; *Howe v. Variety Corp.*, 896 F.2d 1107, 1110 (8th Cir. 1990); *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598, 604 (7th Cir. 1989).

Numerous district courts have relied upon *Moore* to reject employee or retiree claims that informal communi-

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* Petitioners also assert for the first time that reliance upon the SPD pursuant to *Moore*, instead of informal communications, denies petitioners' "due process in this case." (Ptn. 8.) To the extent petitioners are now making a due process argument, they are barred from doing so because they failed to make that argument below. *Heckler v. Campbell*, 461 U.S. 458, 469-69 n.12 (1983).

cations vest welfare benefits despite an express and unambiguous reservation of rights provision in the SPD. *See, e.g., Aguilio v. Police Benevolent Ass'n of the New York State Troopers, Inc.*, 857 F. Supp. 190, 204-05 (N.D.N.Y. 1994); *Snyder v. Elliot W. Dann Co.*, 854 F. Supp. 264, 271 (S.D.N.Y. 1994); *Rovira v. AT & T*, 817 F. Supp. 1062, 1071 (S.D.N.Y. 1993); *Etherington v. Bankers Life & Cas. Co.*, 747 F. Supp. 1269, 1276-79 (N.D. Ill. 1990).

B. Petitioners assert that the decision in *Moore* conflicts with the decisions of other Circuit Courts of Appeal. (Ptn. 8.) Petitioners assert that "[e]merging case law in ERISA situations is diverging from the *Moore* standard." *Id.* (citing *Mullins v. Pfizer, Inc.*, 23 F.2d 663, 668-69 (2nd Cir. 1994); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3rd Cir. 1993); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988)).

Mullins, Fischer and *Berlin,* however, do not conflict with *Moore* because these cases involved conduct tantamount to fraud and addressed an issue distinct from the one in *Moore.* In these cases, the respective courts held that a plan sponsor, acting in its fiduciary capacity, may not materially mislead plan participants about changes to an employee benefits plan. *Mullins,* 23 F.3d at 664, 667-69; *Fischer,* 994 F.2d at 134-35; *Berlin,* 858 F.2d at 1163-64. In each case, the plan sponsor tricked or otherwise encouraged one or more employees into taking early retirement by stating that the plan sponsor was not considering the implementation of an early retirement program with enhanced benefits. *Mullins,* 23 F.3d at 665, 669; *Fischer,* 994 F.2d at 132, 134-35; *Berlin,* 858 F.2d at 1160, 1163-64. In reliance upon these statements, one or more plan participants opted for early retirement, and shortly thereafter, the plan sponsor implemented an early retirement program with enhanced benefits. *Mullins,* 23 F.3d at 665, 669; *Fischer,* 994 F.2d at 132, 134-35; *Berlin,* 858 F.2d at 1160, 1163-64.

Mullins, Fischer and *Berlin* thus differ from *Moore*. In each case, the plan participants alleged conduct tantamount to fraud. In *Moore* and in this case, however, there was an express finding that plan participants did not allege conduct tantamount to fraud. *Moore*, 856 F.2d at 493; *DeGrooth*, 837 F. Supp. at 488. Moreover, *Moore* and this case did not involve any allegations that plan participants retired because of misrepresentations about the future enhancement of early retirement benefits. *Moore* and this case therefore do not conflict with *Mullins, Fischer* and *Berlin*.

C. *Moore* also does not conflict with *Schoonejongen v. Curtiss-Wright Corporation*, 18 F.3d 1034 (3d Cir.), *cert. granted*, 115 S. Ct. 42 (1994). In *Curtiss-Wright*, the Third Circuit Court of Appeals construed Section 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3), which provides in pertinent part: "Every employee benefit plan shall provide a reasonable procedure for amending such plan, and for identifying the persons who have authority to amend the plan." The Court invalidated a plan sponsor's amendment terminating all benefits, because the plan did not specify a procedure for amendment or identify the persons who have authority to amend the plan in violation of Section 402(b)(3). 18 F.3d at 1040. The Court reasoned that although the plan sponsor had the power to terminate the plan because it had reserved the right to amend or terminate the SPD, the sponsor had not exercised that power properly under Section 402(b)(3). *Id.*

This case and *Moore* are not implicated in any way by *Curtiss-Wright*. *Curtiss-Wright* addressed and decided an issue relating to the interpretation of and compliance with Section 402(b)(3). This case and *Moore* do not involve Section 402(b)(3). Therefore, the grant of certiorari in *Curtiss-Wright* does not implicate this case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH G. BISCEGLIA *
CRAIG C. MARTIN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

DAVID W. DEBRUIN
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Attorneys for Respondents

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* Counsel of Record